90-551
NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MC EVOY TRAVEL BUREAU, INC.

V.

HERITAGE TRAVEL, INC.
DONALD R. SOHN
AND
NORTON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Are the mail and wire fraud statutes, 18 U.S.C. §§1341, 1343, violated and *McNally v. United States*, 483 U.S. 350 (1987), satisfied by establishing a defendant's intent to effectuate a "scheme...to defraud" in which one party is deceived and another party deprived of money or property, or must the deceived party lose some money or property?[1]

LIST OF PARTIES

"[T]he names of all parties appear in the caption of the case." Rule 14.1(b). The petitioner corporation has "no parent or subsidiary company to be listed." Rule 29.1.

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1 If this petition is granted, two other misinterpretations of the mail and wire fraud statutes by the lower court would also be raised, providing petitioner alternative grounds for relief and the Court a basis for further elucidation of the statutes' breadth, but these issues are not presented as reasons to grant the writ:

1. Were the second clauses of 18 U.S.C. §§1341, 1343, here violated because the defendants "obtain[ed] money or property by means of false or fraudulent pretenses, representations, or promises...." when they deceived the regulatory authorities about the real nature of their "in-plant" travel agency operation, which, secretly, involved illegal rebates and "kickbacks"?

2. When McEvoy was stripped of the Norton Company travel business by the defendants' illegal "in-plant" operation and the associated "kickbacks", was that a "scheme...to defraud" violative of 18 U.S.C. §§1341, 1343, even though McEvoy was not directly "deceived"?

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Petitioner, McEvoy Travel Bureau, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, originally entered on June 1, 1990, on which a petition for rehearing was then denied on June 28,1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 904 F.2d 786 (1st Cir. 1990), the Memorandum and Order of the United States District Court for the District of Massachusetts at 721 F.Supp. 15 (Mass. 1989), and copies of both opinions appear in the "separately presented" Appendix hereto.[2]

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was handed down on June 1, 1990 (App. 1), but petitioner duly filed a petition for rehearing or, alternatively, a rehearing in banc (App.32-52)[3] and that petition was denied by the lower court on June 28, 1990 (App.25), so this petition is

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2 Because the Appendix materials are relatively "voluminous", they are "separately presented" in the Appendix hereto filed as a "separate volume" herewith, as per Rule 14.1(k), and the Appendix will be hereinafter cited as "App.___."

3 Mindful of the different timing provisions of Rule 13.4 for "a petition for rehearing" and "a suggestion...for a rehearing in banc", petitioner points out that its petition was for "rehearing by the initial panel" (App.33) or, alternatively, "in banc" although it is entitled "Petition For Rehearing In Banc", as is customary, so the petition is, substantively, clothed as a "petition for rehearing", and was so recognized by the lower court [App. 25), such that the time for filing this petition runs from the date of its denial. It was not simply a suggestion for in banc rehearing.

timely filed, in accordance with the provisions of Rule 13.1 and .4. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §§1341, 1343 and 1961(1) are set out in the Appendix, pages 53-55, as per Rule 14.1(f). As the citation to 18 U.S.C. §1961(1) indicates, this is a, so-called, RICO case, the complaint alleging only violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968, but the other sections of that Act are not really "involved in the case" in this Court, nor any longer are the provisions of 49 U.S.C. §§1373(b)(1), 1472(d)(1) and (2). They were "involved" in the lower court, but they are, in any case, set out "verbatim" in the Appendix, page 8, in the margin of the lower court opinion.

STATEMENT OF THE CASE

The plaintiff, McEvoy Travel Bureau, Inc., was a small travel agency operating in Worcester, Massachusetts, and, in 1980, it entered into a long-term contract with the defendant, Norton Company, a large, multi-national corporation headquartered in Worcester, under which contract McEvoy would be the exclusive agent for all of Norton's substantial

travel business in the Worcester area and, eventually, in other areas nationally where Norton operated. McEvoy had for more than 30 years been servicing Norton's air travel business, but the 1980 contract expanded that to include car rentals, hotel reservations and convention business. The contract provided for rebates to Norton on McEvoy's commissions from all the business except air fare commissions, for at that time travel agencies were prohibited by federal regulations from giving their corporate customers rebates from air fare commissions. The regulations were modified, however, in 1982, and, beginning in 1983, air fare commission rebates by travel agencies on domestic air travel were permitted, but not on international air travel commissions. The McEvoy-Norton contract was, accordingly, modified to permit Norton to share in domestic air fare commissions beginning in 1983. A substantial part of Norton's air travel business was international.

During their more than 30 years of business relations before they entered into their expanded exclusive arrangement in 1980, McEvoy and Norton had established a close relationship based on honesty and mutual respect. Norton knew that McEvoy provided excellent service at the lowest possible cost,

and even though large competing travel agencies continuously solicited Norton for its valuable multi-million dollar travel business, McEvoy was impervious, as there was no advantage competitors could offer Norton, particularly no money saving. By 1982, economic conditions and management policy saw Norton's concern become overweening that all costs, including the costs of travel services, be kept as low as possible; even small cost savings became vital. In early 1983, Norton suddenly sent out requests for bids to service Norton's travel business to several travel agencies, and McEvoy, stunned, refused to bid, viewing that as a breach of its exclusive contract and the bid procedure as nothing but a "cover" to replace it, for some reason, with another travel agency. McEvoy informed Norton of its reasons and importuned reconsideration, but in May, 1983, the exclusive travel contract was awarded to the defendant, Heritage Travel, Inc., a large national travel agency. McEvoy's best efforts to find other business to replace the loss of the Norton account were unavailing, its profits rapidly decreased, and in 1985, all its assets were sold for hundreds of thousands of dollars less than the 1983 fair market value of the business with the exclusive long-term contract with Norton.

In October, 1983, McEvoy brought suit against Norton in the Massachusetts Superior Court for Norton's wrongful termination of its travel business. After years of unsuccessful efforts to procure a copy of the Norton/Heritage contract, which Norton claimed provided it with lower cost travel service, in the middle of the 1988 state trial Norton was ordered to provide McEvoy with a copy of that contract. It turned out that there were two contracts, and they provided the principal basis for McEvoy bringing this RICO action nine months later against Norton, Heritage, and Donald R. Sohn, the president of Heritage.

The "real" contract between Norton and Heritage explained how Heritage had been able to provide Norton with a financially more beneficial net cost deal than could McEvoy or any other law-abiding travel agency. They constructed a totally illegal, so-called, "in-plant" arrangement whereby Heritage rebated to Norton prohibited commissions from international air travel and paid Norton rent for the dedicated Heritage office on Norton premises, which rent payments were also then prohibited. Norton and Heritage could not, however, have operated under that contract unless it were kept quite secret. The

air travel industry was and is operated and regulated by two self-regulatory associations, in 1983, the Air Traffic Conference ("ATC") and the International Air Transport Association ("IATA"), which issued, supervised, and strictly enforced broad-ranging and very detailed rules and regulations for the governance of the industry, which rules and regulations were in accordance with and effectuated Federal law and international treaties and agreements. Strict compliance with those multifaceted ATC and IATA regulations was a business necessity for air line carriers and travel agencies, like McEvoy and Heritage, to operate, not a matter comparable to a voluntary trade association membership with but advisory guidelines. Any prospective agreement between Norton and Heritage detailing their "in-plant" operation had first to be approved by ATC and IATA, or Heritage could not have even begun to do business with Norton, and if Heritage's subsequent operations under the agreement, per regular on-going reports, did not at all times comply with every applicable rule and regulation, Heritage would have had to cease servicing Norton's travel needs immediately and risk other sanctions.

The Norton/Heritage "in-plant" contract, providing as it did for illegal rent payments and international commission rebates from Heritage to Norton, would never for a moment have been approved and authorized by ATC and IATA. The defendants, therefore, devised a simple evasion to secure the necessary ATC-IATA approvals for their "in-plant" operation--totally fraudulent, but simple: they drafted and submitted a phoney contract. The phoney contract submitted to both ATC and IATA was very general; contained no figures or information relevant to the parties' financial sharing arrangement; duly provided throughout that every applicable ATC-IATA rule and regulation would be complied with; but said nothing about rent payments, and, most particularly, specified categorically (and quite fraudulently, of course) that "Heritage shall not in any way grant a rebate to the Corporation [Norton]." In June, 1983, Norton and Heritage secured the necessary ATC-IATA approvals for the, supposed, "in-plant" operation by means of the subterfuge of the totally fraudulent contract in ostensible compliance with all the applicable regulations, then, in October, 1983, secretly executed their real "in-plant" contract, which

specified that Heritage would pay Norton the illegal rents and rebates, and they disclosed that real contract to no one.

In its very detailed RICO complaint McEvoy alleged (insofar as the allegations remain relevant to the narrow Question Presented here): that the "pattern of racketeering activity", the criminal "predicate acts", consisted of literally thousands of incidents of mail and wire fraud, "indictable under" 18 U.S.C. §§1341 and 1343; that they had a continuous "relationship" with each other and a "fraudulent scheme", on-going for at least the five years from 1983 to 1988 and probably continuing; that each of the almost daily uses of the mail and wire was foreseeably necessary to effectuate a tripartite "fraudulent scheme" with the specific intent reasonably calculated to defraud McEvoy of the Norton travel business and give it to Heritage, including the intent to defraud the regulatory agencies into approving a fraudulent "in-plant" arrangement. The first level of that "fraudulent scheme" was to get the "in-plant" operation, supposedly legal, approved in the first instance by ATC-IATA by means of the phoney contract and the operation maintained over the subsequent years by mailing fraudulent weekly reports and financial accountings cloaking the illegal rebate and rent

payments to Norton. The second level of the "fraudulent scheme" was to operate and maintain the "real" "in-plant" arrangement which undercut and replaced McEvoy. That necessitated the almost daily use of interstate wire (since every international air travel ticket was the basis for an illegal commission rebate and Heritage used American Airlines' SABRE computerized ticketing system, based in Dallas, Texas) and various regular mailings to maintain the dedicated separate "in-plant" bank account and regular financial accountings between Heritage's headquarters in Cambridge, Massachusetts and Norton's in Worcester. The third alleged level of the "fraudulent scheme", while important to the RICO case and having insidious and broad-ranging ramifications to the airline industry, is not relevant to the narrow Question Presented here.[4] All the various other elements necessary for the RICO claims

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[4] A $350,000 a year illegal "kickback" was allegedly paid by American Airlines to defendants Sohn/Heritage to insure that Heritage continued to use American's SABRE computerized ticketing system, rather than one of the competing computerized systems owned by another airline (the very remunerative "usage fees" from which systems rival the income derived by the airlines from air carriage itself!). Those "kickbacks" made the Norton "in-plant" arrangement, with its generous international air fare commission "give-ups" as illegal rebates, financially viable for Heritage. McEvoy alleged that "on information and belief" those "kickbacks" were facilitated by uses of the mails and interstate wire "as opposed to handshakes and cash transfers in open fields", but that confirmation of "such usages [would].. have to await discovery."

specified in four counts against the defendants were duly alleged and are not here in issue. The mail and wire fraud Question Presented arose in the context of a RICO action--whether there were validly alleged "predicate acts"--rather than a criminal prosecution, but this is not, here, a "RICO case."

The defendants filed motions to dismiss in the district court for failure to state a claim, proffering every imaginable RICO defense, common law defenses (statutes of limitations and res judicata) Federal Rules defenses (insufficient specificity of fraud allegations), etc.--a shotgun array. The matter was fully briefed and argued, and on September 25, 1989, Skinner, J. filed his Memorandum and Order allowing defendants' motions to dismiss and ordering "judgment of dismissal...forthwith" (App. 26-31)[5] Two of Judge Skinner's grounds to dismiss (#'s

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[5] The defendants filed various documentary materials with their motions, ostensibly to controvert some factual allegations of the complaint, but did not ask that the matter be transformed into a motion for summary judgment, as per Fed.R.Civ.P. 12(b). The plaintiff responded with some additional documentary materials, pointing out the anomaly and questioning if the matter was going to be disposed of "as provided in Rule 56." Judge Skinner's decision made only one allusion to "matters outside the pleading", and plaintiff pointed out this procedural posture in its brief-in-chief on appeal. Some of those "matters outside the pleading" were then utilized for some arguments in defendants' briefs and plaintiff's reply, but the Court of Appeals opinion does not mention those arguments or allude to any facts de hors the complaint. The opinion discussion is consistently stated in terms of a "12(b)(6) motion" and the holding is to affirm the district court

1 and 3, App. 30-31) were based on misrepresentations of plaintiff's complaint allegations, as was explained in plaintiff's brief on appeal, and the lower court opinion implicitly recognizes, by ignoring them, that both those grounds were errant. The third ground (#2, App.30) was that the "predicate acts [of] mail fraud and wire fraud" were "alleged only in connection with a single transaction, the securing of a contract with Norton" by Heritage. (That totally incorrect reading of the complaint was not mentioned in the lower court opinion, but it also implicitly recognizes that error.) An appeal was duly prosecuted by the plaintiff.

The defendants' plethora of district court arguments were repeated in their briefs, and on June 1, 1990, the Court of Appeals handed down its opinion affirming the dismissal. The court held (App. 24):

> Since McEvoy's complaint does not sufficiently allege a scheme to defraud anyone of money or property within the meaning of the mail and wire fraud statutes, the complaint fails to allege even a single predicate act of

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Footnote 5 Continued
dismissal "for failure to state a claim" (App. 2). This Court's factual record would, therefore, consist of the relatively simple and focussed allegations of the complaint; no record ambiguities would diffuse the stark Question Presented.

> racketeering activity, and *a fortiori* fails to allege a pattern of racketeering activity as is required under RICO.[6]

Since the court's focus on whether or not 18 U.S.C. §§1341, 1343 violations were sufficiently alleged "predicate acts" transformed what was, truly, a non-issue in the briefs into the issue,[7] and since the court had totally overlooked the second independent clause of 18 U.S.C. §§1341, 1343[8] the plaintiff duly filed a Petition For Rehearing In Banc, asking, alternatively, "that there be a rehearing by the initial panel" or "reheard in banc" (App.33) pointing out the court's aberrational interpretations of the mail and wire fraud statutes which were in conflict with decisions of this Court and other Circuits (App.33-52). On June 28, 1990, the court "ordered that the petition for rehearing and the suggestion for rehearing en (sic) banc be denied (App. 25) and this Petition is now timely filed.

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6 But for this holding that insufficient mail and wire fraud "predicate acts" were alleged, the validity of all the other RICO elements of the complaint was, essentially, *a fortiori* after the lower court's decision in *Fleet Credit Corp. v. Sion*, 893 F.2d 441 (1st Cir. 1990), interpreting and applying *H.J., Inc.* v. *Northwestern Bell Telephone Co.*, ___U.S.___, 109 S.Ct. 2893 (1989).

7 The defendants summarily argued in passing what the court made its key holding (the Question Presented here) on a total of three pages of the 90 pages of defendants' briefs, and then only obliquely suggesting the rationale constructed by the lower court.

8 That the statutes are violated by "obtaining money or property by means of false or fraudulent pretenses, representations, or promises...", the first "merits" issue specified in footnote 1, supra.

REASONS FOR THE ALLOWANCE OF THE WRIT

It cannot be gainsaid that the subject mail and wire fraud statutes, 18 U.S.C. §§1341, 1343, are two of the most important and frequently utilized criminal provisions of the United States Code, and their use is burgeoning.[9] Here, the lower court's holding that "the same party must be both deceived and injured to state a violation" of the mail and wire fraud statutes--that "establishing the existence of a scheme to deceive one party, thereby depriving another property" is not enough (App. 23, n. 13)--is in direct conflict with the interpretations of those statutes established by six other Circuits and is a fundamental misinterpretation of this Court's holdings in *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987), as will be specified below. The lower court's only cited supporting authority (App. 23) is a dictum in *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988): "If a scheme to defraud must involve the deceptive

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9 Aside from the hundreds of pages of headnotes of reported decisions in United States Code Annotated, of which a substantial portion are quite recent, multiples of that number of cases based upon those statutes were, of course, never appealed (pleas taken in routine criminal cases, etc.), and those statutes are now the "most commonly used...predicate acts" in the exploding field of RICO litigation, "especially in civil RICO cases." Rakoff and Goldstein, RICO Civil and Criminal Law and Strategy, p. 1-12, 1990.

obtaining of property, the conclusion seems logical that the deceived party must lose some money or property." That "conclusion" was based upon what this petitioner maintains was a misinterpretation of this Court's decisions in *McNally v. United States, supra*, and *Carpenter v. United States, supra*, and while it was pure dicta ("the case before us today does not require us to decide this general question", *United States v. Evans, supra*, at 40), it does demonstrate some Second Circuit allegiance with the First here in this conflict in Circuits. A panel of the Ninth Circuit has also held that in *McNally* "the Court made it clear that the intent [for a 18 U.S.C. §1341 conviction] must be to obtain money or property from the one who is deceived", *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989), but that supporting authority was even overlooked by the lower court in this case, as petitioner pointed out in its petition for rehearing (App. 51, n. 7).

Of the six Circuits in conflict with the panels of the First, Second and Ninth on this issue of the scope of the mail or wire fraud statutes,[10] three of the opinions so demonstrating are post-

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10 There are even intracircuit conflicts in the First and Ninth, as is demonstrated on pages 20-22, *infra*.

McNally and are cited first, and three are pre-*McNally*:[11]

> **Third Circuit** - In *United States v. Olatunji*, 872 F.2d 1161 (3d Cir. 1989), INS was the party "deceived", but the DOE lost money, the court holding, on page 1168, that the "false statements and representations" do not have to be "made directly to the ultimate victim, i.e., the DOE" (Emphasis in original). In *United States v. Piccolo*, 835 F.2d 517 (3d Cir. 1987), a conviction for violation of the mail fraud statute was affirmed, even though the defendant's acts of fraud or deception and the "victim" thereof were three steps removed in the scheme to defraud from the party who ended up losing money from the fraud.
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> **Seventh Circuit** - In *United States v. Cosentino*, 869 F.2d 301 (7th Cir.), *cert. denied*, ___U.S.___, 109 S.Ct. 3220 (1989), the Illinois Department of Insurance was deceived by the defendants and that "permitted [an insurance] agency to remain in business" which "allowed the defendants more time to take [the insurance agency's] money", ostensibly valid commissions. *Id.* at 307. The convictions were affirmed. In *United States v. Keane*, 852 F.2d 197 (7th Cir. 1988), the City of

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11 Since these pre-*McNally* courts were interpreting the meanings of the mail and wire fraud statutes themselves, their opinions are not less "in conflict"--unless, of course, the Court was, *sub silentio* in *McNally* working the restrictive substantive change in the law, established for decades, which the lower court (and its Second and Ninth Circuit allies) perceived. That is what this case can clarify.

Chicago was the "deceived" "victim", while the remote bond holders were the ultimate parties whose "property rights" were harmed, the court observing, at 205: "a valid conviction [can be obtained] if the prosecution shows that the defendant defrauded someone out of property:"; "the statute does not limit the category of victims"; "much effort was spent at trial trying to figure out who, if anyone, was the poorer as a result of Keane's machinations."

Eleventh Circuit - In *Lomelo v. United States*, 891 F.2d 1512, 1518 (11th Cir. 1990), jury instructions were held defective because "the jury could have found the defendants guilty without finding that they deprived anyone of money or property." "*McNally* and *Carpenter* teach that the mail fraud statute applies to any fraudulent scheme involving a monetary or property interest", where it "would result in depriving another of something of value." *United States v. Dynaelectric Co.*, 859 F.2d 1559, 1570 (11th Cir. 1988).

(Pre-McNally):

Fourth Circuit - In *United States v. Venneri*, 736 F.2d 995 (4th Cir.), *cert. denied*, 469 U.S. 1035 (1984), a Marriot hotel employee was bribed by the defendant to award a subcontract to defendant's company, and the court held that there was a sufficient property right lost because defendant's competitors were "defrauded" (here, read McEvoy),

even though unbeknownst to them, of their rights fairly to compete for the business.

Fifth Circuit[12] In *United States v. Foshee*, 606 F.2d 111 (5th Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), "none of the banks suffered a loss from the check kiting operation" conducted by the defendants--they obtained loans from other sources "to cover the kited checks", "resulting in losses to [those] various lending institutions" which were totally unaware of the defendants fraud, "undeceived." The court said, at 113, a "loss was sustained as a result of the scheme. [Citations omitted] Fraudulent intent is supported by 'proof that someone was actually victimized by the fraud.' [Emphasis in original]...In mail fraud cases, evidence is not limited to proof of losses to intended victims." In *Gregory v. United States*, 253 F.2d 104 (5th Cir. 1958), the defendant postal worker won a football contest by back-dating his entry, actually filled out after the games were played. The court held that there was a violation of the mail fraud statute because although the contest judge was the one deceived, the other

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12 A Fifth Circuit post-McNally case could even be cited as being in accord with petitioner's position and a further indication of the scope and reality of the conflict with the lower court. In *United States v. Matt*, 838 F.2d 1356 (5th Cir. 1988), the conviction would still have been affirmed had the bonding company reimbursed the "deceived" party, Brown & Williamson, all the $390,000 Brown & Williamson, lost, rather than only $260,000. The court recognized that a violation was proven when someone was caused to lose money or property by the fraud; the "deceived" and "loser" need not be the same party.

contestants were deprived of their property rights to win, fairly to compete, although oblivious of the fraud. The court said, on 109, "The thing which is condemned [by §1341] is (1) the forming of the scheme to defraud, however and in whatever form it may take, and (2) a use of the mails in its furtherance....The aspect of the scheme to 'defraud' is measured by a nontechnical standard."

Tenth Circuit - In *United States v. O'Malley*, 535 F.2d 589 (10th Cir.), *cert. denied*, 429 U.S. 960 (1976) (cited as authoritative in *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393 [9th Cir. 1986], *infra*), the court held, on 592:

> [I]n a prosecution under 18 U.S.C. §1343,...the prosecution need not prove that the scheme was successful or that the intended victim suffered a loss or that the defendant secured a gain. The gist of the offense is a scheme to defraud [now, per *McNally*, involving "property"] and the use of interstate communications to further that scheme.[13]

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13 Petitioner does not here present in further support of this pervasive conflict the regiment of district court opinions reflecting this split in the circuits, believing those cites would add little that is persuasive if this conflict in circuits is no inately persuasive. Those district court opinions will be arrayed to assist the Court, of course, in petitioner's brief on the merits, if this petition is allowed.

There are even intra-circuit conflicts in the lower court and in the Ninth Circuit as to whether it is mandated that, as the Second Circuit put it in *United States v. Evans, supra*, at 39, "the person deceived also had to [be the one to] lose money or property." Not cited in the lower court's opinion is a contrary decision of the court's by a wholly different panel only last year, *United States v. Allard*, 864 F.2d 248 (1st Cir. 1989). There, the Commonwealth of Massachusetts was deceived into issuing the defendant a medical license which enabled him to receive a salary from Worcester City Hospital and fees from patients. The district court, considering the effect of *McNally*, had dismissed on Information charging the defendant with "mail fraud in violation of 18 U.S.C. §1341"; but, "[b]ecause we do not believe that *McNally* requires the dismissal", Id. at 249, the court reversed. Also not cited in the opinion below was another panel's broad reading of *McNally* in *United States v. Ochs*, 842 F.2d 515, 522 (1st Cir. 1988):[14] "The Supreme Court reversed [in *McNally*], holding in essence that the mail fraud statute was intended to protect property rights but not 'the intangible right of the citizenry to good government'": and "the *Carpenter* Court

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14 Petitioner cited both that case and *United States v. Allard, supra*, in its Petition For Rehearing In Banc (App. 32-52).

gave a broad reading to protected property interests." In the Ninth Circuit (granted, far larger than the First, so more understandable, perhaps, that the right hand be unaware of the left), the *Lew* panel, *supra*, did not cite a different panel's decision only the year before in *United States v. Egan*, 860 F.2d 904 (9th Cir. 1988). That opinion says that this Court reversed in *McNally* "because the jury had not been charged that it must find some deprivation of money or property" and that the *Egan* "jury did not consider whether other individuals [other than the City of Carson, which was "deceived"] were defrauded or whether Egan defrauded anyone of money or property." *Id.* at 909 and n. 2 (Emphasis supplied). Another Ninth Circuit panel's decision not cited in the *Lew* opinion (although pre-*McNally*, if that matters) is *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986). Just as in this case, one party was "deceived" by the RICO defendant's mail and wire "scheme...to defraud" (Chambers) but another party, the plaintiff, was the one which lost money. The court held that the plaintiff "pleaded the elements of mail and wire fraud sufficiently to withstand a motion to dismiss" because "it is not necessary to show that the scheme was successful or that the

intended victim suffered a loss or that the defendants secured a gain." Id. at 1400.

As the last reason to grant the writ, petitioner submits, most fundamentally, that the lower court (and the Second and Ninth Circuits) has woefully misinterpreted this Court's decisions in *McNally* and *Carpenter*. The Court was not, *sub silentio*, impressing a restriction upon the long-established body of authority interpreting the breadth of the mail and wire fraud statutes. The First Circuit panel in *United States v. Ochs, supra*, was quite correct: all the Court was "holding in essence [was] that the mail [and wire] fraud statute was intended to protect property rights but not 'the intangible right of the citizenry to good government'."[15] The broad theme throughout the Court's opinion in *McNally* is that a mail fraud defendant need only to intend (and intent is the heart of the crime, of course, something which the lower court opinion here seems not to realize) that there somehow be a loss or prospective loss of "property rights" by someone:

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15 This case does not involve the enactment of 18 U.S.C. §1346, any question of its retroactivity, or any contention that "the intangible right of honest services" is involved—one of the non-issues alluded to in the lower court's opinion (App. 13-14).

> The mail fraud statute clearly protects property rights...[T]he original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.
>
> *Durland v. United States*, 161 U.S. 306 (1896), the first case in which this Court construed the meaning of the phrase "any scheme or artifice to defraud" held that the phrase is to be interpreted broadly insofar as property rights are concerned...It construed the statute to "includ[e] everything designed to defraud...." "[i]t was with the purpose of protecting the public against all such intentional efforts to despoil...that this statute was passed...."
>
> ...the statute's purpose is protecting property rights....
>
> ....
>
> ... "wronging one in his property rights"...frauds involving money or property.
>
> ...we read §1341 as limited in scope to the protection of property rights (107 S.Ct. 2879-2881).[16]

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16 The Second Circuit panel in *United States v. Evans, supra,* the lower court's only cited authority in support, cited two other "dicta" from *McNally* which, it thought "may" "indicate" that "the person deceived also had to lose money or property":

> ...any benefit which the Government derives from the statute must be limited to the Government's

Quite simply, it tortures the Court's opinions in *McNally* and *Carpenter* to impress upon them the very restrictive reading given them by the lower court here (and the Second and Ninth Circuit panels). Surely, Justices STEVENS and O'CONNOR, from their *McNally* dissent, would agree that those minority view Circuits are badly misreading *McNally* and 18 U.S.C. §§1341, 1343.[17]

Footnote 16 continued

> interests as property holder (107 S.Ct. at 2881, n. 8).
>
> ...the words "to defraud" commonly refer "to wronging one in his property rights by dishonest methods or schemes" (107 S.Ct. at 2880-81).

The first quote,in context, simply meant that the Government on the facts of *McNally*, had to show that it had some "property rights" involved since no other party conceivably had any. The court was not in a phrase reversing a century of law, but simply conjoining its holding that "property rights [must be] concerned" in any mail fraud violation. The second quote obviously does not construct the principle that A's loss of property from deceiving B does not violate the statute. In context the implicit emphasis is on the word "property"--that "property rights" must be somehow lost as a result of the defendant's "dishonest methods", although in most cases, of course, the party "deceived" is the party whose "property rights" are harmed.

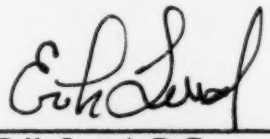
17 Petitioner also takes issue with the lower court's labored limitation of the statutory "defraud" to "deceive" (App. 16-17), but accepts it for purposes of the Question Presented here. The demonstration that the statutes' "defraud" intent is broader and would here encompass the illegal "in-plant" as the engine of McEvoy's destruction can be made under the rubric of the second "merits issue" if this petition is granted.

To obviate prolixity, petitioner would hope that the Court can appreciate the fact that the Question Presented here is, given the demonstrated conflict in circuits, a veritable check-list of "cert.-worthiness" as those factors are delineated in Stern & Gressman, Supreme Court Practice, 6th ed., 1986. The mail and wire fraud statutes are probably called into issue either in criminal indictments or RICO complaints filed almost daily in most district courts. As Mr. Justice WHITE observed in dissenting from the denials of certiorari in *Ransom v. United States*, 434 U.S. 908 (1977) and *Lay v. Williams*, 434 U.S. 910 (1977), criminal law conflicts in circuits should be resolved since the "national criminal code should not be differently interpreted in different courts; some individuals should not be punished for conduct for which others would go free", and an issue "is clearly an important one which significantly affects a great number of persons...[and the Court has] previously granted certiorari to decide [a similar issue]." This conflict is too pervasive for "benign neglect" to serve as sufficient remedy. This Court should resolve the matter. For petitioner to delineate further would be "to pile Ossa on Pelion."

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to the United States Court of Appeals for the First Circuit.

Respectfully submitted,



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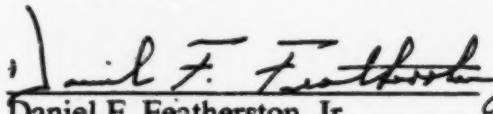

Daniel F. Featherston, Jr.